

Preliminary Draft
of
Proposed Amendments
to the
Federal Rules
of
Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 15, 2003

Administrative Office of the U. S. Courts

Leonidas Ralph Mecham, Director

**A SUMMARY FOR BENCH AND BAR
(AUGUST 2002)**

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Bankruptcy Rules, Criminal Rules, and Evidence Rules have proposed amendments to various rules and are seeking public comment on the proposed changes.

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved these proposals** but submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules amendments and explanatory Committee Notes are set out in the *Request for Comment* pamphlets, which are posted on the Internet at <www.uscourts.gov/rules> and are available on request from the Secretary to the Rules Committee. The synopses on the following pages highlight the major aspects of the proposed Bankruptcy, Criminal, and Evidence Rule amendments. The synopses are intended to stimulate greater public comment and participation in the rulemaking process. The synopses are drawn largely from the committees' reports, which are also set out in the *Request for Comment* pamphlets.

The rules committees welcome all comments, whether favorable, adverse, or otherwise. All comments from the public on these proposals will be considered individually and carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges.

Written comments or comments sent electronically must be received by the Secretary to the Rules Committee **no later than February 15, 2003**. Comments may be sent electronically via the Internet at <www.uscourts.gov/rules>.

An opportunity is also provided to the public to appear at scheduled public hearings to testify regarding the proposals. Requests to appear at a public hearing must be received by the Secretary to the Rules Committee no later than 30 days prior to the scheduled date for the public hearing. Information on the Secretary's mailing address and the dates and places of the scheduled public hearings is set out at the end of this brochure.

Under the proposed schedule, the rules amendments would become effective on December 1, 2004, or later if — following the public comment period — they are in turn approved, with or without revision, by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court, and if they are not altered by Congress.

I. Proposed Amendment to the Federal Rules of Bankruptcy Procedure:

Under the proposed amendments to **Rule 9014** (Contested Matters), the mandatory disclosure and conference provisions of Rule 26 of the Federal Rules of Civil Procedure would no longer apply in contested matters, unless the court directs otherwise. Contested matters are typically resolved quickly, rendering the mandatory disclosure and conference provisions ineffective on most occasions. The mandatory disclosure and conference provisions would continue to apply in adversary proceedings.

II. Proposed Amendments to the Federal Rules of Criminal Procedure:

Rule 41 (Search and Seizure) would be amended to provide procedural guidance for a judge issuing a “tracking-device” warrant, which is authorized under 18 U.S.C. § 3117 and case law. The proposed amendments would regulate: the issuance of a tracking-device warrant; the contents, execution, and return of a tracking-device warrant; and the notice to the person who has been tracked. The proposed amendments also conform to the USA PATRIOT Act of 2001 (Pub. L. 107-56) by including a provision that authorizes a judge to delay any notice required in conjunction with issuing any search warrant.

III. Proposed Amendments to Rules Governing § 2254 and § 2255 Proceedings:

Proposed amendments to several 28 U.S.C. § 2254 and § 2255 rules were published for comment in August 2000 to conform with the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132) (AEDPA) and to eliminate outdated provisions. The Advisory Committee on Criminal Rules decided to defer further action on the proposals in light of the public comments and because it wanted to complete the stylization of the rules by eliminating ambiguities and simplifying and clarifying the text.

The Advisory Committee considered, but ultimately rejected, an effort at integrating both § 2254 and § 2255 rules into a single set of rules. The following discussion highlights the principal proposed stylistic and substantive rules revisions.

The current provisions in **Rule 2(e)** of the § 2254 Rules and **Rule 2(d)** of the § 2255 Rules authorize the clerk of court to return a submitted petition or motion if it does not comply with the rules. The provisions would be deleted and a new one added in **Rule 3(b)** of the § 2254 and § 2255 Rules that would require the clerk of court to file and enter on the docket all petitions and motions submitted for filing under these rules, even if they were in some way procedurally defective. The amendments parallel the approach taken in Civil Rule 5(e) and recognize the critical importance of filing as a consequence of the one-year statute of limitations set by the AEDPA for filing under the § 2254 and § 2255 Rules. The Act’s limitations provisions are expressly referenced in amended Rule 3 of the § 2254 and § 2255 Rules. Also, the rules would be amended to permit a person acting on behalf of the § 2254 petitioner or § 2255 movant to sign the petition or motion.

Amended **Rule 4** of the § 2254 Rules and § 2255 Rules permit service by regular mail in addition to certified mail, which is required under the present rules. Service of a petition under amended Rule 4 of the § 2254 Rules may be made on the attorney general or on another appropriate state officer.

New **Rule 5(e)** of the § 2254 Rules and new **Rule 5(d)** of the § 2255 Rules would allow a petitioner or movant to file a reply to the respondent’s answer or other pleading within a time fixed by the court.

Rule 9(a) of the § 2254 Rules and § 2255 Rules, which address the consequences of a delayed petition or motion, would be deleted. The applicable one-year statute of limitations under the AEDPA renders those provisions unnecessary. **Rule 9(b)** in both sets of rules would be amended to require that a petitioner or movant first seek approval from the appropriate court of appeals before filing a second or successive petition or motion in conformance with the AEDPA.

The **Model Form for Use in Applications for Habeas Corpus Under 28 U.S.C. § 2254** and the **Model Form for Motions Under 28 U.S.C. § 2255** have been revised to reflect stylistic

changes, changes in the rules, and changes required by the AEDPA. The **Model Forms for Use in 28 U.S.C. § 2254 and § 2255 Cases Involving a Rule 9 Issue** would be deleted. The Advisory Committee is developing comprehensive revisions to the forms to account for the AEDPA and outdated provisions.

IV. Proposed Amendment to the Federal Rules of Evidence:

In August 2001 a proposed amendment to **Rule 804 (b)(3)** (Hearsay Exceptions; Declarant Unavailable) was published for public comment. The proposed amendment required that every proponent of a declaration against penal interest provide “corroborating circumstances” that clearly indicate the trustworthiness of the unavailable witness’s statement. The current rule requires “corroborating circumstances” supporting the trustworthiness of a statement *exculpating* an accused, but it does not explicitly require this support for a statement *incriminating* an accused; nor does it require corroborating circumstances for a declaration against penal interest offered in a civil case. Consistent with the majority view expressed in the case law, the Advisory Committee on Evidence Rules had originally proposed that the corroborating circumstances standard apply to all declarations against penal interest. But the Committee has decided to withdraw and reconsider the proposal in light of the public comments.

Instead, the Advisory Committee has revised the original proposal to account for the Supreme Court’s holding in *Lilly v. Virginia*, 527 U.S. 116 (1999), which requires that a statement *incriminating* an accused bear “particularized guarantees of trustworthiness” to satisfy the Confrontation Clause. The Committee noted that the *Lilly* standard may be different from the one requiring “corroborating circumstances” and concluded that explicit reference to “particularized guarantees of trustworthiness” was proper for statements incriminating an accused. Like the original proposal, the proposed amendment extends the “corroborating circumstances” requirement to declarations against penal interest offered in civil cases.

Public hearings are scheduled to be held on the amendments to

- Bankruptcy Rules in Washington, D.C., on January 24, 2003;
- Criminal Rules (including § 2254 and § 2255 Rules) in Atlanta, Georgia, on January 31, 2003; and
- Evidence Rules in Washington, D.C., on January 27, 2003.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing.

All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Comments on the proposed rule amendments may also be sent electronically via the Internet at <www.uscourts.gov/rules>.

In accordance with established procedures all comments submitted on the proposed amendments are available for public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at <www.uscourts.gov/rules> on the Internet. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

John K. Rabiej, Chief
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